SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (Cont.)

TABLE OF CASES (Cont.)

TABLE OF TEXTBOOKS

TABLE OF STATUTES

No. 736,737

In the Supreme Court of the United States

OCTOBER TERM, 1947

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO CROSS-PETITIONS FOR WRITS OF CERTIORARI

To The Honorable the Supreme Court of the United States:

Cross-respondent, C. D. Johnson Lumber Corporation,

a corporation, through its counsel, in opposition to the Cross-Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof, filed by cross-petitioner, respectfully shows as follows:

PROCEEDINGS IN COURTS BELOW

A. Original jurisdiction of these causes by the District Court of the United States for the District of Oregon was obtained under Sec. 41 (1) (Judicial Code, Section 24, amended) Title 28, U. S. C. A.

B. November 1, 1946, the District Court of the United States for the District of Oregon entered orders adjudging the use and necessity of the condemnation of rights-of-way for logging roads across cross-petitioner's land (11569 R. 79-85; 11570 R. 19-20).

C. November 13, 1946, the judgments of the District Court of the United States for the District of Oregon were entered and filed (11569 R. 93-100; 11570 R. 22-28).

D. December 12, 1947, the opinions of the United States Circuit Court of Appeals for the Ninth Circuit were rendered and filed (11569 R. 742-752; 11570 R. 62). Neither opinion has been officially reported at the time of preparation of this brief.

E. December 12, 1947, the decrees of the United States Circuit Court of Appeals for the Ninth Circuit were entered and filed (11569 R. 753; 11570 R. 63).

F. March 3, 1948, a petition for rehearing of said

causes was denied by the United States Circuit Court of Appeals for the Ninth Circuit (11569 R. 761-768; 11570 R. 71-73).

G. March 8, 1948, the United States Circuit Court of Appeals for the Ninth Circuit filed orders staying issuance of mandates.

STATEMENT OF THE CASE

In order to correct omissions and inaccuracies in the statement of the case as set forth in the cross-petitions for writs of certiorari, cross-respondent shows as follows:

Two actions were brought in the Circuit Court of the State of Oregon for the County of Lincoln by C. D. Johnson Lumber Corporation, a Nevada corporation (hereinafter referred to as "Johnson"), duly qualified for the doing of business in Oregon and operating a sawmill at Toledo, Oregon, for the condemnation of two rights-of-way over the lands of cross-petitioner, Oregon Mesabi Corporation, a Delaware corporation (hereinafter referred to as "Mesabi"), for use as roads in transporting timber and other raw products of the forest from timberlands owned by Johnson to its sawmill at Toledo. The first right-of-way is sixty feet wide and slightly over a mile in length. The other right-of-way is a spur road taking off at a midway point of the first right-of-way and is sixty feet wide and about a quarter of a mile long (11569 R. 2-8; 11570 R. 2-3).

These actions were filed pursuant to Chapter 2, Title 12, of the Oregon Compiled Laws Annotated, which stat-

utes were passed following the adoption by referendum of an amendment to Article I, Section 18, of the Oregon Constitution. The rights-of-way involved traverse rough and sparsely populated lands, valuable almost entirely for the timber thereon. Following the filing of these actions, Mesabi removed them to the District Court of the United States for the District of Oregon (11569 R. 8-22; 11570 R. 4-6).

The two cases were consolidated for trial (11569 R. 77; 11570 R. 17) and proceeded to trial before the District Court (McColloch, J.) on the issue of necessity for the taking (11569 R. 183-304).

At the trial it was shown that Johnson is the owner of a timber tract bounded on three sides by holdings of Mesabi (11569 R. 276, 718). Mesabi in its cross-petition (paragraph 4, pages 2-3) has stated that the timber tract of Johnson is "accessible to the state highway along the Siletz River, over two existing roads crossing Johnson's own cut-over lands and connecting said tract with the highway (R. 699 and 718)."

Said "existing" roads do not connect Johnson's said timber tract with any highway. For a connection to be made it would be necessary to extend said roads in order to transport timber from Johnson's tract. Because of the roughness of the terrain in that area, such extensions are so impracticable as to be impossible. Four expert witnesses, all logging engineers with extensive logging experience, testified as to the necessity for the appropriation of a right-of-way for a logging road across Mesabi's land and to the impracticability of extending said "exist-

ing" roads into the timber tract sought to be logged. The testimony of Carl C. Jacoby, Johnson's logging superintendent, was that the difficulty of taking logs over the corner not surrounded by Mesabi's land, across a canyon and up a steep bluff for 1200 feet was a type of operation unheard of and so impracticable as to be impossible (11569 R. 206-237). The testimony of Henry Thomas, a leading forest engineer since 1912, was that there is no other reasonable or practicable way for Johnson to remove its logs than by the rights-of-way sought to be condemned (11569 R. 240-251). The testimony of Harry C. Patton, a graduate logging engineer practicing since 1921, was that these rights-of-way are necessary and the only reasonable means for removing the timber from Johnson's land (11569 R. 252-257). Merrill H. Ward, a logging engineer for twenty years, testified to the same effect (11569 R. 258-263). Dean Johnson, president of Johnson and in full charge of its operations, testified that he had determined such rights-of-way to be necessary prior to the time these actions were filed (11569 R. 264).

Following the trial on the issue of necessity for the taking, separate orders were issued "adjudging use and necessity" (11569 R. 79; 11570 R. 19).

The two cases were then consolidated for jury trial on the issue of damages (11569 R. 304-653).

Regarding the question of damages, Mesabi has stated in its cross-petition (page 5): "The damages awarded and deposited in court covered only the value of the lands and timber actually taken, and no damages to the prop-

erty not taken." The damages awarded did, in fact, include full compensation for the value of the land appropriated and full compensation for all other injury and damage which Mesabi suffered by reason of the appropriation (11569 R. 642-646).

After the trial separate verdicts were filed (11569 R. 86; 11570 R. 20). Thereupon Johnson paid into court the damages assessed by the jury, and judgments appropriating the rights-of-way were entered (11569 R. 93; 11570 R. 22). Johnson entered into possession of the rights-of-way, subject, however, to the right of Mesabi to make such necessary crossing of the rights-of-way as would not unreasonably interfere with the use of the rights-of-way by Johnson.

Mesabi appealed from the judgments of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit (11569 R. 727-730; 11570 R. 42-45).

The Circuit Court of Appeals rendered its opinions, reversing the judgment of the lower court on two main grounds (11569 R. 742-752; 11570 R. 62): (1) that Oregon law was applicable and that Oregon law did not permit the introduction into evidence of certain plats of surveys (11569 R. 751-752); (2) that the failure of the District Court to make a finding as to whether the rights-of-way should be exclusive or ordinary prevented the proper determination of the measure of damages in each case (11569 R. 748-750).

The Circuit Court of Appeals entered its decrees, reversing the judgments of the District Court (11569 R. 753; 11570 R. 63).

A petition for rehearing of said causes was denied by the Circuit Court of Appeals (11569 R. 762-763; 11570 R. 72-73).

SUMMARY OF ARGUMENT

Cross-respondent summarizes its argument in opposition to the cross-petitions for writs of certiorari as follows:

I

The Circuit Court of Appeals for the Ninth Circuit in deciding that the appropriation of rights-of-way for logging roads over Mesabi's property was for a public use did not decide any question of local law in conflict with decisions of the courts of the State of Oregon.

II

The Oregon statutes under which an owner of timberland has the right to condemn rights-of-way across the land of another reasonably necessary to promote the transportation of logs and raw products of the forest are not in violation of the 14th Amendment to the Constitution of the United States.

III

Reasonable necessity for appropriation of rights-of-way for logging roads over Mesabi's lands was clearly shown.

IV

The term "right-of-way" was properly used by the lower court and by the trial court.

V

Under Oregon law a foreign corporation has the same power and right as a domestic corporation to condemn land necessary for a logging road.

VI

Exclusion by the trial court of certain evidence on damages offered by Mesabi was correctly affirmed.

ARGUMENT

I

The Circuit Court of Appeals for the Ninth Circuit in Deciding That the Appropriation of Rights-of-Way for Logging Roads over Mesabi's Property Was for a Public Use Did Not Decide Any Question of Local Law in Conflict with Decisions of the Courts of the State of Oregon.

The decisions collected on page 10 of the cross-petitioner's brief include a number of decisions rendered prior to the amendment in 1920 of Article I, Section 18, of the Oregon Constitution. None of those decisions are pertinent to the problem of whether or not the present appropriation is for a public use under the constitution and laws of the State of Oregon. The development of the law of Oregon both prior to and after 1920 relative to the power of a person or corporation to condemn a right-of-way reasonably necessary for the transportation of logs and products of the forest is accurately described in

Flora Logging Co. v. Boeing (D. C. Oregon 1930), 43 F. (2d) 145.

In *Anderson v. Smith-Powers Logging Co.* (1914), 71 Or. 276, 139 Pac. 736, the Oregon court held that the condemnation of the land of another for a logging road, under the Oregon statutes which then authorized such condemnation, was unconstitutional under Article I, Section 18, of the Oregon Constitution as not being for a public use, despite the contention that the development of the timber industry of Oregon was a matter of extreme importance, ultimately for the public benefit. The court stated, however (p. 297):

> "* * * if conditions in this state have so changed as to make it necessary to have a change in our Constitution, relating to the taking of property for private uses, the proper remedy lies in amending the Constitution, as has been done in several states."

In 1920 the Constitution of the State of Oregon was amended by adding to Article I, Section 18, the following proviso:

> "Provided, that the use of all roads and ways necessary to promote the transportation of the raw products of mine or farm or forest is necessary to the development and welfare of the state and is declared a public use." (See Laws of Oregon 1921, p. 5.)

Pursuant to this constitutional amendment the legislature of the State of Oregon enacted inter alia Secs. 12-201 et seq., O. C. L. A., under which the present proceedings were commenced.

State vs. Hawk (1922), 105 Or. 319, 208 Pac. 709, cited by Mesabi, is not pertinent to the present discussion. It is in no way similar to this case on the facts and does

not involve the right of an individual to condemn land, but involves and upholds the power of the State of Oregon to condemn lands for a public use. The court states at page 326:

> "The question: What is a public use? is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for an appropriation of property, but it will not be conclusive: Cooley's Constitutional Limitations (5 ed.), p. 666.
>
> "The question of whether a proposed use is a public one is for the courts to determine as a question of fact: * * *"

It is true the question of what is a public use not only is a judicial one, to be finally determined by the courts, but it is fundamental that where the people of a state have declared in the organic law of that state that a particular use of land shall be a public one, the courts of that state are bound by that declaration to the extent that this organic law does not violate the Constitution of the United States or some law or treaty made thereunder.

Smith, et al., v. Cameron, et al. (1922), 106 Or. 1, 7-19, 210 Pac. 716, is cited by Mesabi as being contrary to the view that the present taking under Sec. 12-201 et seq., O. C. L. A., is not for a public use. The case involved the right under a different statute of a landowner by condemnation proceedings to obtain the right to enlarge a ditch on the land of an adjacent landowner for the purpose of conveying sufficient water to irrigate his lands and those of his neighbors. The case contains a discussion of the Oregon law as to what is a public use and the deci-

sion holds that the taking there involved, although authorized by the legislature, was not for a public use and was therefore unconstitutional under Article I, Section 18, of the Oregon Constitution. However, the court made these significant comments regarding the effect of the 1920 Amendment to Article I, Section 18 (p. 7 and 8):

> "Article I, Section 18, of our state Constitution as amended in 1920 reads as follows:
>
> " 'Private property shall not be taken for public use, nor the particular services of any man demanded without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; *provided, that the use of all roads and ways necessary to promote the transportation of the raw products of mine or farm or forest is necessary to the development and welfare of the state and is declared a public use.*'
>
> "For convenience that portion which was added to Article I, Section 18, by the amendment of 1920 is italicized. * * *
>
> "It is appropriate to explain that the amendment resulted from the decision rendered in Anderson v. Smith-Powers Logging Co., 71 Or. 276 (139 Pac. 736, L. R. A. 1916B, 1089); and it is worthy of notice that the amendment is limited to 'roads and ways necessary to promote the transportation of raw products of mine or farm or forest.' "

On page 19 the court concludes:

> "If it is desirable as a matter of public policy that a private person may be permitted to condemn private property so that he can irrigate his own private land, the remedy is, as was suggested in Anderson v. Smith-Powers Logging Co., by an amendment to the Constitution: * * *"

Coos Bay Logging Co. v. Barclay (1938), 159 Or. 272, 76 P. (2d) 672, involved the right of an owner of timberland under Section 12-201 et seq., O. C. L. A., to condemn a right-of-way across lands of another for a logging road and railroad to transport logs from its lands and from the lands of owners along the right-of-way. The court decided therein that a private landowner could condemn land for this purpose upon the payment of just compensation without violating either the Constitution of the State of Oregon or the 14th Amendment to the Constitution of the United States. The following statement was made, at page 292:

> "By requested instructions and otherwise, defendants challenged the legality and constitutionality of the proceedings to condemn the right of way."

In the opinions of the people of the State of Oregon and of the legislature and Supreme Court of the State of Oregon, the public welfare of the State of Oregon demands that rights-of-way necessary to promote the transportation of the raw products of the forest should not be made impossible by the refusal of a private owner to sell the right to cross his land.

> cf. *Strickley v. Highland Boy Gold Mining Company* (1906), 200 U. S. 527, 50 L. ed. 581, 583.

The decision by the Circuit Court of Appeals for the Ninth Circuit that the taking of rights-of-way across Mesabi's land in this case was for a public use is in harmony with the Constitution, legislative enactments, and decisions of the Supreme Court of the State of Oregon.

II

The Oregon Statutes Under Which an Owner of Timberland Has the Right to Condemn Rights-of-Way Across the Land of Another Reasonably Necessary to Promote the Transportation of Logs and Raw Products of the Forest Are Not in Violation of the 14th Amendment to the Constitution of the United States.

This Court in several cases has determined that state statutes which permit condemnation by individuals in pursuance of the declared public policy of the state are not in conflict with the 14th Amendment.

In *Hairston v. Danville & W. R. Co.* (1908), 208 U. S. 598, 607, 52 L. Ed. 637, the court said at page 607:

> "The propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in Falbrook Irrig. District v. Bradley; Clark v. Nash; and Strickley v. Highland Boy Gold Min. Co.,—ubi supra. What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws."

This case involved a condemnation of land by a railroad company for a spur track to furnish access to the factory of a tobacco company and for the storage of cars to be loaded and unloaded by receivers and shippers of freight to this factory and could be used for temporary storage of loaded or empty cars by shippers. This court upheld the taking in that case as being one for a public use with the following comments (p. 608):

> "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost."

Clark v. Nash (1905), 198 U. S. 361, 49 L. Ed. 1085, 1087, was an action by a private land owner to condemn a right of way for an irrigation ditch under a Utah statute that had been upheld by the Supreme Court of Utah. This court stated at page 367:

> "* * * whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private."

In concluding that the statute which authorized this condemnation was not in conflict with any provision of the United States Constitution as so applied, the court stated at page 369:

"We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the state statute which provides, under the circumstances stated in the act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

"* * * we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land and which will be valuable and fertile only if water can be obtained. Other land owners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, * * *."

Fallbrook Irrigation District v. Bradley (1896), 164 U. S. 112, 41 L. Ed. 369, involved the validity of an assessment under the irrigation act of California of 1887 for nonpayment of which the plaintiff's land was sold. The assessment was levied to construct water works and irrigation facilities within a particular irrigation district to benefit arid lands within that district. It was objected that the use for which the water was to be procured was not in any sense a public one because it was limited to the landowners who may be such when the water was to be apportioned and that the interest of the public was only that indirect and collateral benefit that it derives from every useful improvement made within the state. The contention was answered by this court at page 161:

"The fact that the use of the water is limited to the

> landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. * * * It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water."

Strickley v. Highland Boy Gold Mining Co. (1906), 200 U. S. 527, 50 L. Ed. 581, involved the condemnation by a mining corporation of a right-of-way for an aerial bucket line, which was upheld by the Supreme Court of Utah. The mining corporation was using the line or way to carry ores, etc., for itself and others from the mines it owned to a distant railroad station. The single question presented was the constitutionality of the Utah statute under the 14th Amendment to the United States Constitution. Mr. Justice Holmes stated at page 531:

> "The question, thus narrowed, is pretty nearly answered by the recent decision in Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the 14th Amendment which prevents a state from

requiring such concessions. If the state Constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

"In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

In considering the constitutionality of a Washington statute which permitted condemnation for the purpose of a logging road by the owner of timberland, the court in *Ruddock v. Bloedel Donovan Lumber Mills* (9th C. C. A., 1928), 28 F. (2d) 684, 687, referring to the cases of

Clark v. Nash (1905), 198 U. S. 361, 49 L. Ed. 1085;

Strickley v. Highland Boy Gold Min. Co. (1906), 200 U. S. 527, 50 L. Ed. 581;

Hairston v. Danville & W. R. Co. (1908), 208 U. S. 598, 52 L. Ed. 637;

stated:

"If the cases to which we have referred do not offend against the Fourteenth Amendment, we are unable to say that a statute authorizing the owner of timber land to condemn a right of way to give access to and remove his timber has that effect."

In *Flora Logging Co. v. Boeing* (D. C. Oregon, 1930), 43 F. (2d) 145, a logging corporation owning timberland

in Oregon brought suit to condemn, under Sec. 12-201 et seq., O. C. L. A., a right-of-way for a logging railroad across unimproved timberland of the defendant Boeing for the purpose of transporting logs and products of the forest from its land to points where the road could connect with a common carrier railroad. The primary objection raised was that if such condemnation was allowed by the constitution and statutes of Oregon, nevertheless, the taking thereunder violated the 14th Amendment. The court thoroughly reviewed the legislative history of Sec. 12-201 et seq., O. C. L. A., and stated (p. 147):

> "The question, thus narrowed, is answered by a review of the Constitution, statutes, and decisions of the Supreme Court of the state, where the amendment of 1920 to the state Constitution provides 'that the use of all roads and ways necessary to promote the transportation of the raw products of * * * forests is necessary to the development and welfare of the state and is declared a public use,' and the act of the Legislature of 1921 granting the right to condemn for the purposes here sought did not violate the Constitution of the United States.
>
> "The people of the state have, by their Constitution, legislative enactment, and decisions of their highest court, expressed their opinion that the public welfare of the state demands that right of way for the transportation of the raw products of the forest should not be made impossible by the owner of property refusing to consent to sell the right to cross his land."

The only other state having a constitutional provision similar to that contained in Article I, Section 18, of the Oregon Constitution is Idaho. The constitutionality of the Idaho Constitution and procedures thereunder were upheld in

Potlatch Lumber Co. v. Peterson (1906), 12 Ida. 769, 88 Pac. 426;

Blackwell Lumber Co. v. Empire Mill Co. (1916), 28 Ida. 556, 155 Pac. 680.

The condemnation by Johnson of rights-of-way over the land of Mesabi pursuant to Section 12-201 et seq., O. C. L. A., and Article I, Section 18, of the Oregon Constitution was for a public use and did not violate the 14th Amendment to the United States Constitution.

III

Reasonable Necessity for Appropriation of Rights-of-Way for Logging Roads over Mesabi's Land Was Clearly Shown.

When the intended use for which the appropriation is to be made by eminent domain is a public one, the necessity or expediency for the taking is a legislative question which may be determined by the legislature or delegated by it.

In *Rindge Co. et al., v. County of Los Angeles* (1923), 262 U. S. 700, 709, 67 L. ed. 1186, 1193, the court stated:

> "* * * The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process

in the sense of the 14th Amendment.' Bragg v. Weaver, 251 U. S. 57, 58, 64 L. ed. 135, 136, 40 Sup. Ct. Rep. 62 * * *."

Mississippi and Rum River Boom Company v. Patterson (1879), 98 U. S. 403, 406, 25 L. ed. 206, 207.

Sears v. Akron (1918), 246 U. S. 242, 251, 62 L. ed. 688, 698-699.

Coos Bay Logging Co. v. Barclay (1938), 159 Or. 272, 293, 79 P. (2d) 672.

City of Eugene v. Johnson (1948), 46 Or. Advance Sheets 425, 429.

Notwithstanding the reference by Mesabi at page 27 of its cross-petition to Section 12-207, O. C. L. A., it is provided in Section 12-202, O. C. L. A.:

> "Any such person, firm or corporation shall have the right to acquire and own all lands *reasonably necessary* for said logging road or way to promote the transportation of logs or the raw products of the forests." (Italics added.)

and in Section 12-203, O. C. L. A.:

> "No more lands shall be appropriated under the provisions of this chapter than are *reasonably necessary* for the purposes specified in this act; * * *" (Italics added.)

Thus there has been a determination by the state legislature that a reasonable necessity for the appropriation is the criterion and not an absolute necessity.

Numerous cases have interpreted the meaning of the word "necessary" as used in eminent domain statutes. The overwhelming weight of authority is that absolute and unconditional necessity need not be shown; it is sufficient if,

under all the facts and circumstances, a reasonable necessity or expediency is shown.

In *McCarthy v. Bloedel Donovan Lumber Mills* (C. C. A. 9, 1930), 39 F. (2d) 34, 35, cert. den. (1930), 282 U. S. 840, 75 L. ed. 746, 51 S. Ct. 21, the plaintiff, a corporation engaged in logging, sought to extend its logging railroad by eminent domain proceedings under the Washington statutes. The court, through Judge Dietrich, stated at page 35:

> "* * * Under the law, admittedly it may take only such a right of way as is 'necessary', and the question of necessity is one for the court, to be determined in the light of all the facts. The statute has been construed by the Supreme Court of the state, and by that construction we are bound. The point, however, is not of great importance, for the views of the Washington court are in accord with the doctrine generally prevailing under similar eminent domain statutes. In Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 P. 670, 673, the Washington court said:
>
> " 'But the word "necessity", as used in the statute, "does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route (here another location), considered in connection with the relative cost to one, and probable injury to the other." '
>
> "And in State ex rel. Postal Telegraph-Cable Co. v. Superior Court, 64 Wash. 189, 116 P. 855, 857, the court said:
>
> " 'We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views,

is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection.

" 'Plainly the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary it conclusively establishes the necessity. * * * The condemnor does not have to show an absolute necessity, but only a reasonable necessity. As we have said the prima facie case made by evidence of the selection can only be overcome by clear and convincing proof that the taking of the specific land sought would be so unnecessary and unreasonable as to be oppressive and an abuse of the power.' "

Lewis Eminent Domain (Third Edition) §601:

"* * * 'It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interfered with.' If the petitioner is acting in good faith and shows a reasonable necessity for the condemnation, in view of its present and future business, the application should be granted. * * *"

Aurora & G. Ry. Co. v. Harvey (1899), 178 Ill. 477, 53 N. E. 331, 334:

"* * * In the construction of statutes relating to the taking of private property, the word 'necessary' should be construed to mean 'expedient', 'reasonably convenient', or 'useful to the public', and cannot be limited to an absolute physical necessity. This, we think, was certainly the intention of the legislature

when the act was passed. The view here expressed seems to be well supported by the authorities. * * *"

Also see:

Meriwether v. Board of Directors (C. C. A. 8, 1908), 165 Fed. 317, 319.
Coos Bay Logging Co. v. Barclay (1938), 159 Or. 272, 294, 79 P. (2d) 672.
Spring Valley Water-Works v. Drinkhouse (Cal., 1891), 92 Cal. 528, 28 Pac. 681, 682.
In re New Haven Water Co. (1912), 86 Conn. 361, 85 Atl. 636, 639.
Wilton v. St. Johns County (Fla., 1929), 123 So. 527, 65 A. L. R. 488, 501.
Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (1908), 131 Ga. 129, 62 S. E. 52, 55.
Minear v. Plowman (Iowa, 1924), 197 N. W. 67, 68.
Davidson et ux v. Commonwealth ex rel (Ky., 1933), 61 S. W. (2d) 34, 36.
Warden v. Madisonville, H. & E. R. Co. (Ky., 1908), 108 S. W. 880, 882.
Commissioners of Parks and Boulevards v. Moesta (Mich., 1892), 51 N. W. 903, 905.
State et al., v. Whitcomb et al. (Mont., 1933), 22 P. (2d) 823, 826.
Sayre v. City of Orange (N. J., 1907), 67 Atl. 933.
In re Application of Staten Island Rapid Transit Railroad Co. (1886), 103 N. Y. 252, 8 N. E. 548.
In re Union El. R. Co. (1889), 113 N. Y. 275, 21 N. E. 81, 82.
Seabrook v. Carolina Power & Light Co. (S. C., 1930), 156 S. E. 1, 2.
White v. Johnson et al. (S. C., 1929), 146 S. E. 411.
Miller et al. v. Town of Pulaski (1912), 114 Va. 85, 75 S. E. 767, 768-9.
State ex rel. v. Superior Court (Wash., 1923), 219 Pac. 857, 858.

Chicago & N. W. Ry. Co. v. City of Racine (Wis., 1929), 227 N. W. 859, 831.
29 C. J. S., Eminent Domain, § 90, p. 886.
18 Am. Jur., Eminent Domain, § 107, p. 734, and cases cited therein.

The determination of the necessity or expediency of the exercise of the power of eminent domain by the grantee of that power, in the absence of fraud, bad faith or abuse of discretion, is final and is not subject to review by the courts.

City of Eugene v. Johnson (1948), 46 Or. Advance Sheets 425, 429.
Coos Bay Logging Co. v. Barclay (1938) supra, p. 294.
Patterson Orchard Co. v. Southwest Arkansas Utilities Corporation (1929), 179 Ark. 1029, 1033, 18 S. W. (2d) 1028, 65 A. L. R. 1446, 1454.
Douglass et al. v. Byrnes et al. (C. C. D. Nev. 1893), 59 Fed. 29, 32; affirmed *Byrnes v. Douglass* (C. C. A. 9, 1897), 83 Fed. 45.
Wilton v. St. Johns County (1929), 98 Fla. 26, 123 So. 527, 535, 65 A. L. R. 488, 502.
Postal Tel. Cable Co. v. Oregon Short-Line Railroad Company (1901), 23 Utah 474, 484, 65 Pac. 735.
State ex rel Stephens v. Superior Court (1920), 111 Wash. 205, 190 Pac. 234, 235 (cited in Mesabi's brief).
Lewis, Eminent Domain (3rd Ed.) § 601.

That some other route or location could be selected which is more suitable is not a proper objection for the purpose of showing a lack of necessity.

Oregon-Washington R. & N. Co. v. Wilkinson (C. C. E. D. Wash., 1911), 188 Fed. 363, 368.
Petition of Fayette County Com'rs. (1927), 289 Pa. 200, 137 Atl. 237, 240.

Sisters of Providence v. Lower Vein Coal Co. (Ind. 1926), 154 N. E. 659, 665.
State v. Superior Court for Grays Harbor County (Wash. 1941), 119 P. (2d) 694, 702.
State ex rel v. Superior Court of King County (1907), 46 Wash. 516, 90 Pac. 663, 665.
State et al. v. Whitcomb et al. (Mont., 1933), 22 P. (2d) 823, 826.

The parties herein agreed that the proper method under the Oregon law for the determination of the question of necessity was to submit the matter to the court sitting without a jury (11569 R. 175-176).

At the hearing four expert witnesses, all logging engineers with extensive logging experience, testified for Johnson as to the necessity for the appropriation. The testimony was uncontroverted that it was necessary to condemn Mesabi's land for rights-of-way for logging roads in order to remove timber from Johnson's timber tract (11569 R. 206-237, 240-251, 252-257, 258-263, 264).

Based upon the evidence before it, the District Court made a finding that these rights-of-way are necessary for Johnson for the transportation of raw products of the forest (11569 R. 79).

The Circuit Court of Appeals for the Ninth Circuit decided that "the court found such necessity on ample evidence" (11569 R. 749). The finding of the District Court, affirmed by the Circuit Court of Appeals, should not be disturbed in the absence of clear error. *Rule* 52 (*a*), *Rules of Civil Procedure:*

> "* * * Findings of fact shall not be set aside unless clearly erroneous, * * *."

This Court has held that concurrent findings of fact by the two courts below will not ordinarily be disturbed.

Boehmer v. Penn. R. Co. (1920), 252 U. S. 496, 64 L. ed. 680, 40 S. Ct. 409.

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co. (Ill. 1944), 321 U. S. 275, 88 L. ed. 721, 64 S. Ct. 593.

There was an ample showing of necessity for the appropriation of Mesabi's land for rights-of-way for logging roads.

IV

The Term "Right-of-Way" Was Properly Used by the Lower Court and by the Trial Court.

The Circuit Court of Appeals for the Ninth Circuit and the trial court properly used the term "right-of-way" (11569 R. 747, 748, 751) as indicating an easement or a quantum of title or interest less than a fee, and the use of the term in this manner in no way confused the issues in this case.

Rights-of-way granted to or condemned by a railroad for railroad purposes have been characterized as *sui generis* and, no doubt, a railroad right-of-way may in some cases constitute more than a mere easement, partaking of the character and nature of a fee simple title.

New Mexico v. United States Trust Co. (1898), 172 U. S. 171, 180-185, 43 L. Ed. 407, 411-412.

Western Union Telegraph Co. v. Pennsylvania Railroad Co. (1904), 195 U. S. 540, 570, 49 L. Ed. 312, 323.

155 A. L. R. 381, 389-400, 403-404.

But even when a railroad right-of-way is involved, the authorities indicate that ordinarily the term "right-of-way" designates no more than an easement, an incorporeal hereditament, absent the existence of a statute expressly or impliedly authorizing the condemnation by the railroad of a fee simple.

1 *Thompson, Real Property* (1924), § 420.
18 *Am. Jur., Eminent Domain,* § 121, p. 745-746.
155 *A. L. R.* 381, 384, 386, 389.

In any event, however, a railroad right-of-way is not here involved so the above authorities cited by Mesabi are not in point.

Sections 12-201 and 12-202, O. C. L. A., use the phrases "any proposed road or railway", "said road or railway", "such road or logging railroad", "logging road or way", "such logging railroad, road or ways". The complaints herein allege that the rights-of-way involved were being appropriated for a "logging road" (11569 R. 6; 11570 R. 2). The only reasonable interpretation of the complaints under the statute is that a logging road in the common sense of the words was intended.

The Supreme Court of the State of Oregon has used

the term "right-of-way" many times in referring to the nature of the interest to be acquired by a condemnor under Section 12-201 et seq., O. C. L. A., and clearly did so with the meaning that the interest acquired was an easement or title less than a fee.

> *Coos Bay Logging Co. v. Barclay* (1938), 159 Or. 272, 276, 278, 279, 280, 281, 284, 286, 290, 294, 295.

In *Flora Logging Co. v. Boeing* (D. C. Ore., 1930), 43 F. (2d) 145, 146, 148, the court likewise characterizes the interest condemned under Section 12-201 et seq., O. C. L. A., as a "right-of-way".

In *Shaw v. Proffitt* (1910), 57 Or. 192, 203, 109 Pac. 584, 110 Pac. 1092, the court stated, in defining the term "right-of-way" with reference to a right to maintain an irrigation ditch across the land of another:

> "* * * plaintiff requested of Failing 'a right of way' for an irrigating ditch across his lands. A right of way is an easement of perpetual use, a charge or burden upon the land of one for the benefit of another."

Many other courts have held that "right-of-way", in cases not involving railroad rights-of-way, signifies merely an easement, an incorporeal hereditament.

> *Clawson v. Wallace* (1898), 16 Utah 300, 52 Pac. 9, 10.
>
> *Jean v. Arseneault* (1931), 85 N. H. 72, 153 Atl. 819, 820.

Blake v. Boye (1907), 38 Colo. 55, 88 Pac. 470, 471-472.

Shaw v. Proffitt (1910), 57 Or. 192, 109 Pac. 584.

Oswold v. Wolf (1888), 126 Ill. 542, 19 N. E. 28, 30.

Flaherty v. Fleming (1906), 58 W. Va. 669, 52 S. E. 857, 858-859.

This Court has used the term "right-of-way" or "way" in referring to easements or interests in land of a quantum less than a fee in cases not involving railroad rights-of-way.

Strickley v. Highland Boy Gold Mining Co. (Utah, 1906), 200 U. S. 527, 529, 530, 50 L. ed. 581, 583.

Clark v. Nash (1905), 198 U. S. 361, 362, 370, 49 L. ed. 1085, 1088.

During the course of the hearing upon the necessity of the appropriation and prior to the beginning of the trial before the jury, this matter was discussed by counsel and the court (11569 R. 290-291, 295-299). At that time Johnson explained as its interpretation of the law, which interpretation was subsequently adopted by the court, that Johnson would obtain by these proceedings an unlimited easement, which would be subject to the right of Mesabi to make necessary crossings (11569 R. 295). In the course of this discussion the court said: "* * * I had the same theory, that you are taking an easement rather

than the fee" (11569 R. 298). Thus, prior to the presentation of any evidence to the jury, Mesabi understood what Johnson sought to condemn. It made no objection thereto other than that the complaints did not expressly state the title that Johnson would obtain.

Counsel for Mesabi frequently referred throughout the trial in statements to the trial court and in examining witnesses to the rights being condemned by Johnson as "rights-of-way" (See 11569 R. 180, 181, 264, 266.)

In the light of the foregoing authorities, the discussion between the trial court judge and counsel referred to above, and the use of this term by Mesabi's counsel, the term "right-of-way" was properly and correctly used by the lower court and by the trial court in describing the rights sought to be condemned by Johnson and did not have any tendency to confuse the issues tried by the court or by the jury.

V

Under Oregon Law a Foreign Corporation Has the Same Power and Right as a Domestic Corporation to Condemn Land Necessary for a Logging Road.

The authorities cited by Mesabi to the effect that a foreign corporation may not condemn lands without specific statutory authority from the local legislature are not applicable for the reason that the legislature in Oregon has conferred on foreign corporations the power to condemn lands necessary for logging roads.

Section 12-201, O. C. L. A., relating to the condemnation for logging roads, begins:

"Any person, firm or corporation who shall require land * * *"

Section 12-202, O. C. L. A., relating to the right to acquire and condemn lands for logging roads, begins:

"Any such person, firm or corporation shall have the right to acquire * * *"

The rule is well established that statutes conferring the power of eminent domain on "any" or "every" corporation or "all" corporations bestow it on foreign as well as domestic corporations.

18 *Am. Jur., Eminent Domain,* § 30, p. 656:

"By the decided weight of authority, statutes conferring the power of eminent domain on 'every' corporation or 'any' corporation, or in like general terms, have been held to bestow it on foreign, as well as domestic, corporations. A grant of the power of eminent domain has also been held to result from a general grant of power to foreign corporations."

23 *Am. Jur., Foreign Corp.,* § 189, pp. 174-175:

"According to the majority rule, however, the general language in statutes relating to eminent domain and to foreign corporations may be sufficient to confer on such corporations the right to condemn property within the state. Statutes conferring the power on 'any' corporation or 'every' corporation are ordinarily so construed, at least where no legislative intent to confine their benefits to domestic corporations appears.[1] Foreign corporations which become entitled to all the rights and privileges of domestic corporations upon compliance with the statutory conditions for admission to do business in the state are permitted in a number of jurisdictions to exercise

"(1) * * * *Northwestern Electric Co. v. Zimmerman,* 67 Or. 150, 135 P. 330, Ann. Cas. 1915C, 927."

the right of eminent domain to the same extent as similar domestic corporations."

29 *C. J. S., Eminent Domain,* § 25, p. 815:

"The right of a foreign corporation to exercise the power of eminent domain may be gathered by implication. It may be conferred by statutes domesticating foreign corporations on compliance with the statutory prerequisites to doing business in the state; by conferring on them the same powers as may be exercised by domestic corporations; by permitting them to take and hold real estate; by giving the power to 'any person or corporation' or 'any and all corporations' engaged in a designated business;[60] or by conferring the right on 'every railroad corporation' or 'all existing corporations'. Likewise, it has been held that a foreign corporation is included in a statute authorizing 'any person' to exercise the power of eminent domain."

17 *Fletcher Cyclopedia Corporations,* 184-185:

"It is competent for the state to delegate the power of eminent domain to corporations, both domestic and foreign. So the legislature of a state may, unless restricted by constitutional provisions, confer the power upon foreign corporations to the same extent as upon domestic ones,[89] or may confer such power upon foreign corporations under certain conditions, and with certain limitations."

Northwestern Elec. Co. v. Zimmerman (1913), 67 Or. 150, 152-153, 135 Pac. 330, referred to in the footnotes above, involved an action by a Washington corporation in Oregon to condemn trees which were alleged to menace its line of poles and wires being constructed to convey electric current.

"(60) Or.—*Northwestern Electric Co. v. Zimmerman,* 135 P. 330, 67 Or. 150, 152, Ann. Cas. 1915C, 927."

"(89) Oregon. *Northwestern Elec. Co. v. Zimmerman,* 67 Ore. 150, 135 Pac. 330, Ann. Cas. 1915C, 927."

"Plaintiff relies exclusively upon Section 6245, L. O. L., (now § 112-501, O. C. L. A.) which provides: 'A right of way and privilege is hereby granted to any person, persons, or corporation to construct, maintain, and operate telegraph lines, telephone lines, and lines and wires for the purpose of conveying electric power or electricity, along the public roads, highways, and streets of the state,' etc. Provision is thereafter also made for securing rights of way therefor. Plaintiff contends that this statute includes foreign corporations. * * * No doubt when first enacted it was intended to include foreign telegraph companies, as the language naming the persons to whom the privilege is extended is general: 15 Cyc. 574; In re Marks, 6 N. Y. Supp. 105; In re Ohio Valley Gas Co., 6 Pa. Dist. 200. * * * Our statute (Sections 6726, 6727, 6728, L. O. L.) (now §§ 77-301, 77-302 and 77-304, O. C. L. A.) provides when foreign corporations may do business within the state; and it may be considered as an invitation to foreign corporations to come into the state, to enter upon the business for which incorporated, and to that extent, when the conditions are complied with, the corporations, by implication, are extended all the powers and privileges necessary to carry out such business. Such a compliance with the statute has now become a prerequisite to foreign corporations entering the state under Section 6245, L. O. L. In New York, N. H. & H. R. R. Co. v. Welsh et al., 143 N. Y. 411 (38 N. E. 378, 42 Am. St. Rep. 734), it is held that the expression 'any railroad corporation' in the general railroad act of that state must be taken in its comprehensive sense and includes foreign railroad corporations, the statute having authorized foreign corporations to do business in the state upon complying with certain requirements, and says: 'Pro tanto it is settled here under the sanction of our laws, and to the extent of its existence and operation here, in the contemplation of those laws, it is pro hac vice a state corporation.' * * * Therefore, we are of the opinion that the privileges granted by Section 6245, L. O. L., extend to foreign corporations."

An adjudication by a state supreme court that a corporation of another state has the right to exercise the power of eminent domain is conclusive upon the United States courts.

> *Stone v. Southern Illinois & Mo. Bridge Company* (1907), 206 U. S. 267, 272, 51 L. ed. 1057, 1060, 27 S. Ct. 615.

Oregon Railway and Navigation Company v. Oregonian Railway Company (1889), 130 U. S. 1, 32 L. ed. 837, heavily relied on by Mesabi, is not in point because the statute there involved did not contain the words "any person, firm or corporation," or similar words.

Helena Power Transmission Co. v. Spratt (1907), 35 Mont. 108, 88 Pac. 773, cited by Mesabi, is not in point because the Montana statutes then in effect clearly granted the power of eminent domain to domestic corporations only.

As pointed out by the lower court, if the right of eminent domain were denied to a foreign corporation such as Johnson, it would deny to Oregon the utilization of large sums of money by out-of-state investors in the logging industry of the state, thereby depriving the state of one of its "largest sources of income and, incidentally, one of the state's largest sources of taxation" (11569 R. 745).

In Oregon a foreign corporation has the same power and right as a domestic corporation to condemn land necessary for a logging road.

VI

Exclusion by the Trial Court of Certain Evidence on Damages Offered by Mesabi Was Correctly Affirmed.

The Circuit Court of Appeals for the Ninth Circuit correctly affirmed the exclusion by the trial court (11569 R. 631, 633-635) of evidence on the issue of damages offered by Mesabi through its witness, Morgan (11569 R. 462-464, 470-477, 480). The record makes it clear that the trial court's exclusion complained of by Mesabi related only to those portions of Morgan's testimony which related to improper damages (11569 R. 480, 631, 633-635). Morgan obviously based his estimate of the depreciation of the fair market value of the entire tract of land belonging to Mesabi not upon the condemnation and use of the logging roads sought by Johnson but upon the prospective logging operations by Johnson upon its own lands. Referring to Exhibit 13, which was prepared by Mesabi, it may be seen that the same elements of risk and damage, if such, in fact, existed, would have been present when Johnson logged its own lands on Sections 10 and 15 without the use of the condemned roads. Furthermore, should Johnson have been able to remove the timber from the tracts in question by crossing only its own lands, the same damages as those testified to by Morgan would have occurred.

The witness was not required by the court to lump all of the elements of injury together. The witness lumped all of these elements together because he himself was unable to segregate them (11569 R. 476). Even on redirect examination when Morgan had ample opportunity

to explain or segregate the damages, he again assigned the major causes of injury to Mesabi from these appropriations to the logging operations which Johnson had a right to carry on notwithstanding any condemnation proceeding (11569 R. 483).

Morgan testified that his estimate was based not upon the fire hazard from the use of the appropriated lands but on the fire hazard to Mesabi from operations upon Johnson's own lands. When the court struck out this part of Morgan's testimony, it struck that portion only relating to the inclusion of clearly improper damages. This was emphasized soon thereafter (11569 R. 633-635).

The matter struck out was not a proper element of damages; it brought in matters not relevant and which could confuse the jury, and the striking of such testimony was proper.

In *Puget Sound Power and Light Co. v. City of Puyallup* (C. C. A. 9, 1931), 51 F. (2d) 688, 693, 695, the court stated:

> "It would perhaps have been better for the parties, after qualifying their witnesses, to have merely asked the basic questions, 'What is the market value of the property taken?' and 'What is the depreciation of the market value of the property retained by reason of its severance from the property taken?' giving the witnesses full opportunity to explain the basis of their valuation. In such case no doubt the same questions would come up on direct and cross examination, for, if it appeared either on direct or cross examination that the witness had pursued a wholly unwarranted course in arriving at his estimate of value, it would be necessary to make correction thereof either

by striking out his estimate of the market value or by instructing the jury to disregard that portion of the value due to the erroneous method."

CONCLUSION

Questions (1), (2), (3), (5) and (6) of the Questions Presented, as set forth in Mesabi's Cross-Petitions for Writs of Certiorari to the United States Circuit Court of Appeals, have been fully answered. Question (4) is hypothetical.

We respectfully submit that the questions specifically brought forward by the cross-petitions for writs of certiorari and the reasons relied on for allowance of the writs are not of sufficient merit to warrant review on writs of certiorari.

Respectfully submitted,

KING, WOOD, MILLER & ANDERSON,
ROBERT S. MILLER,
926 American Bank Building,
Portland 5, Oregon,

Counsel for Cross-Respondent.